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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 706

BRASS AND COPPER WORKERS FEDERAL LABOR UNION NO. 19,322, AFL-CIO,

Petitioner,

vs.

AMERICAN BRASS COMPANY, KENOSHA DIVISION, a Subsidiary of ANACONDA COPPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Respondent contends that the question actually presented is:

When a labor contract requires arbitration *only if requested within a specified time* may the District Court, in an action for specific performance, compel arbitration without first determining for itself that the request for it was made within that time?

STATEMENT OF THE CASE

The Petitioner's complaint alleged, and Respondent's answer denied, that compulsory retirement of certain employes because of age constituted wrongful discharge. Petitioner seeks a decree requiring Respondent to arbitrate that dispute pursuant to the provisions of the parties' Collective Bargaining Contract. (R. 2-3) Arbitration of *that kind of dispute* is separately and specifically prescribed by Article VII of the Contract. Section 3 of that article makes timely request a condition precedent to arbitration. It provides that:

> "The Company agrees that its action in making *discharges for cause* * * * may be reviewed in arbitration, at the request of either party, but such request *shall be made in writing within ten (10) days after the Company's final answer in writing to the Union.*" (Emphasis supplied) (R. 20)

Section 1 of that article prescribes the method of processing grievances generally. It specifies four procedural "steps". If a dispute is not settled in the first three "steps" use of the Fourth Step (U. S. Conciliation) is optional. (R. 19-20)

Arbitration of disputes which do not specifically involve discharge is authorized by Article VIII of the Contract, but for such disputes it is also a condition precedent to arbitration *that it be requested within a specified time.*

Article VIII, Section 1, provides:

> "Should any dispute arise between the Company and the Union as to interpretation or application of any part of this Agreement which cannot be settled between the parties, then the matter may be submitted to arbitration. This *must be done within ten (10) days* following the date when it is deter-

> mined that the parties cannot agree at the Third Step in the grievance procedure. Except that if either party gives notice of taking the matter to the Fourth Step, then arbitration may be appealed to *within ten (10) days after it is determined that no agreement can be reached by the Fourth Step.*" (Emphasis supplied) (R. 21-22)

In a *Third Step* grievance conference held on April 4, 1955 Respondent verbally refused to reinstate the "discharged" employes. (R. 11)

Petitioner, by its letter of April 12, 1955, requested that Respondent join Petitioner in the Fourth Step by "submitting the *question of illegal discharges* * * * to the U. S. Department of Conciliation for disposal". (R. 13)

Respondent replied by letter dated April 14, 1955, wherein it (1) *reaffirmed* its prior verbal refusal to reinstate the employes, and (2) *declined to participate in the "Fourth Step"*. (R. 14)

Thereafter U. S. Commissioner Virgil H. Burtz contacted both parties and then notified Petitioner by letter dated May 23, 1955 that Respondent's position was "firm" and advised Petitioner that it was "free to proceed with arbitration". (R. 15)

Petitioner has stipulated that it did not request arbitration either within ten days after receiving Respondent's letter of April 14, 1955 (R. 14) nor within ten days after receiving Commissioner Burtz's letter of May 23, 1955. (R. 16)

Petitioner did not request arbitration until June 6, 1955 (R. 16) and although Respondent then refused to arbitrate (R. 17), Petitioner delayed filing of this action for another two years. (R. 3)

ARGUMENT

A.

Timely Request Was an Express Condition Precedent to Arbitration.

The gravamen of Petitioner's complaint and petition is a mistaken notion that Respondent agreed to arbitrate "*any*" dispute. The Contract does not so provide. In this country industrial arbitration is voluntary, not compulsory. We submit that the courts have no power to so revise the Contract as to compel either party to arbitrate a dispute which it did not agree to arbitrate.

Respondent does not now and never has conceded that the "merits" of this dispute are arbitrable; it concedes only that this grievance *would* have been arbitrable if *timely* request therefor had been made.

For the purpose of the present proceeding it may be immaterial whether the petition is based on the provisions of Article VII or those of Article VIII of the Contract because Petitioner did not request arbitration within the prescribed ten-day period specified in either article. The District Court so held. (R. 29-31; Petition 27-29)

It found, *on the stipulated facts*, that the Respondent's letter of April 14, 1955 (R. 14) was its "final answer in writing" within the meaning of Article VII and that Respondent's refusal (in that letter) to participate in U.S. Conciliation confirmed the fact that no agreement could be reached by use of the "Fourth Step" within the meaning of Article VIII of the Contract. (R. 29-30; Petition 27-28)

The District Court's decision is reported at 172 F. Supp. 465. At pages 469-470 (R. 29-31; Petition 27-29) the court said:

> "* * * Apparently something in the nature of such a review has been had in this case in the 'grievance meeting' which took place on April 4, 1955. At this time the Company made clear its position that it did not consider the discharges illegal. When the Union subsequently requested the Company to join it in conciliation proceedings (unnecessarily so if proceeding under Article VII, Section 3), the Company reiterated its position in writing. *Its refusal to join the Union in a final attempt at settlement does not permit a suggestion of a possibility of further negotiation or attempted settlement.* After the Company stated its position in the letter of April 14, 1955, nothing further remained to be done except a request for arbitration under Section 3 of Article VII. Under these circumstances, this letter of the Company may be considered its 'final answer' on this question.
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> * * *
>
> "Assuming that the Union believed it was proceeding to arbitration under Article VIII, its attempted compliance with step four of the Grievance Procedure, i.e., conciliation, was optional under the Agreement. In view of the Company letter, this step might reasonably have been deemed futile and one which the Union would not have been required to pursue. The letter of Commissioner Burtz of May 23, 1955, affirmed that no agreement could be reached through conciliation. The Union did not request arbitration within ten days of receipt of the Commissioner's letter as required by Article VIII, Section 1. *It appears, therefore, that regardless of whether the Union sought arbitration under Article VII, Section 3, or under Article VIII, it failed to comply with conditions to the promise of the Company to arbitrate as set forth in the Agreement.*

"The conditions, in unambiguous language, provide for a specific period of time in which requests for arbitration must be submitted. These terms do not appear unreasonable or harsh on their face.

"The grant of specific performance rests in the sound judicial discretion of a court of equity and must be determined by the peculiar circumstances of each case in light of general equitable principles. *Neary v. Markham*, 155 F. 2d 485 (10th Cir., 1946). *It is neither equitable, nor does the court have the power to rewrite the contract entered into by the Union and the Company.*

"In the absence of the Union's compliance with the specific procedural requirements of the Agreement, the Company's refusal to arbitrate is not in violation of the Agreement, notwithstanding the absence of any forfeiture provisions coupled to the conditions precedent of the arbitration promise. The Union has lost its rights to enforcement of the arbitration promise by noncompliance." (Emphasis supplied).

Those findings were approved by the Circuit Court of Appeals. It said:

"We approve the rationale of the decision in *Boston Mutual*. In the case where a collective bargaining agreement gives no indication of the intended party to determine the issue of procedural arbitrability, it is, in the first instance, for the court to make this decision in a suit brought to compel arbitration. Accordingly, we hold that the district court was correct in considering this issue.

"Further, having found that the district court properly considered the issue of procedural arbitrability, *we find no error in its disposition of this case. Even considering the events most favorable to appellants* (that the letter of May 23 was the 'final answer'), *appellant's request for arbitration came too*

late under the terms of the Agreement, since it was made thirteen days after receipt of the final answer." (Emphasis supplied) (Petition 20) *Brass and Copper Workers, etc. v. American Brass Co.*, 272 F. 2d 849, 854-855

Therefore, Petitioner's first request for arbitration was not made *until after expiration of the time limited* for such request by either article.

B.

Time Was of the Essence.

This Contract was made in Wisconsin, between Wisconsin residents and was intended to be performed in Wisconsin. The Wisconsin Supreme Court has held that where a labor contract provides for arbitration but limits the time during which a party may request it, time is of the essence. In *Wisconsin Motor Corp. v. W.E.R.B.*, 274 Wis. 85, 79 N.W. 2d 119 that court said (pages 94-95 Wis. Reports and page 124 N.W. Reports):

"The company * * * failed to take *timely* steps to demand and bring about such arbitration.

"Two features of paragraph 15, section 6 of the contract are here pertinent. First, it does not say that disputes *shall* be arbitrated, but only that they *may* be referred to an arbitrator. *Thus, arbitration is not automatic. It is a right which a party may avail himself of only by taking the necessary affirmative steps to that end. The references to ten and five workdays show that time is of the essence, and that the contract contemplates prompt action to bring about an arbitration.*

* * *

"We, therefore, are of the opinion that, in the circumstances here present, the company had, *by*

> *its failure to take any affirmative steps to bring about timely arbitration of the question of contract interpretation, * * * foreclosed itself from insisting that the W. E. R. B. should* order arbitration of the dispute * * *." (Emphasis supplied)

In *Aluminum Goods Mfg. Co. v. W.E.R.B.*, 271 Wis. 597, 74 N.W. 2d 154 that court also said (page 603 Wis. Reports and page 157 N.W. Reports):

> "The employer cites a number of authorities to the proposition that *time limitations contained in the collective bargaining agreements are to be strictly enforced.* There is no quarrel with their statement of the rule. * * *" (Emphasis supplied)

C.

In Specific Performance Suits Arbitration Will Not Be Ordered Unless the Parties Agreed to Arbitrate and One of Them Breached the Agreement.

This court, in *Textile Workers Union v. Lincoln Mills* (1957), 353 U.S. 448 charted the course and policy to be followed by the federal courts in actions brought for specific performance of labor agreements pursuant to Sec. 301(a) of the National Labor Relations Act. It there stated on page 455 that Sec. 301(a)

> "* * * expresses a federal policy that federal courts should enforce these *agreements* on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." (Emphasis supplied)

The policy there declared is that labor agreements should be enforced *as written.* This court did not suggest or imply that the courts can or should *modify or rewrite*

labor agreements in an action brought for specific performance. Actually the Petitioner is seeking revision rather than enforcement of the Contract for it asks the court to emasculate and disregard the express time limits therein specified.

The First Circuit in *Local 119, etc. v. General Electric Co.*, 250 F. 2d 922 (cert. den. 356 U.S. 938) said:

(p. 927)

"But when one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that *the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise.* * * *

* * *

(pp. 929-930)

"* * * focusing our attention exclusively on the language of §301(a), it is obvious that the plaintiff, in a suit under §301(a), has the burden of establishing that it is bringing a suit for appropriate relief, legal or equitable, for violation of a term of a collective bargaining agreement; and that therefore *the district court, before undertaking to decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term in the collective bargaining agreement.* * * *"
(Emphasis supplied)

The First Circuit in *Local 201, etc. v. General Electric Co.*, 262 F. 2d 265 also said, at page 267, that:

"* * * it is the established law, in this circuit at least, that when a suit for specific performance of an agreement to arbitrate is brought under §301, *the*

district court, sitting as a court of equity, and before giving the relief requested, *has a necessary preliminary determination to make*, namely, whether respondent is in violation of a promise to arbitrate *the particular issue*. * * *" (Emphasis supplied)

In *Boston Mutual Life Insurance Co. v. Insurance Agents, etc.*, 161 F. Supp. 222 (District Court Mass. 1958), the District Court stated, on page 225, that:

"No doubt the union's right to have a claim arbitrated depends upon its pursuing its demand for arbitration *both in accordance with the specific time limits prescribed in the collective bargaining agreement*, and in accordance with reasonable time limits where no time is specifically prescribed." (Emphasis supplied)

In *Boston Mutual Life Ins. Co. v. Insurance Agents, etc.*, 258 F. 2d 516 (1st Cir. 1958), the Court stated, on pages 521-522, that:

"Where we part company with the district court is in its holding that the determination *whether a reasonable time had elapsed* in the present case 'should be left for initial consideration by the arbitrator, and should not be foreclosed by a court decision preceding the arbitrator's opportunity to rule.' * * *

"* * * We held in *Local No. 149, etc. v. General Electric Co.* that it was only proper to force a party to proceed before an arbitrator if he had agreed to arbitrate, and that necessarily the court must make the determination as to the scope of the agreement.

"* * * whether the Employer had agreed to submit this matter to arbitration depends upon a determination by the court, as a preliminary matter, *whether all the conditions precedent to arbitration have been fulfilled*, including a determination whether the Union acted 'within a reasonable time' in

pressing for arbitration by the American Arbitration Association. * * *" (Emphasis supplied)

In *Refinery Employees Union v. Continental Oil Co.*, 268 F. 2d 447 (1959) the Fifth Circuit also adheres to the foregoing rules. At pages 452-453 that court said:

> "*Even giving the 'broadest liberalities' to private arbitration, parties to a contract cannot be forced to arbitrate an issue they did not agree to arbitrate.* '(W)hen one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the *court, before rendering such a decree has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise.*' * * *
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> * * * *
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> "This Court is committed to the policy that 'private arbitration in the labor-management field is to be afforded broad liberalities'. * * * *But this policy does not permit the Court to find agreement where there is no agreement.*" (Emphasis supplied)

REASONS FOR DENYING THE WRIT

We find no decisions of Circuit Courts of Appeal which conflict with the instant decision of the Seventh Circuit or with those of the First and Fifth Circuits hereinabove cited. The Wisconsin Supreme Court decisions are in accord.

Here the facts are undisputed. Nothing could have been more "final" than Respondent's letter of April 14, 1955. It unequivocally reaffirmed Respondent's claim that the compulsory retirements were not wrongful discharges and by that letter Respondent *refused to partici-*

pate in U. S. Conciliation, which is the Fourth Step of the grievance procedure. As the District Court said, Respondent's "* * * refusal to join the Union in a final attempt at settlement does not permit a suggestion of a possibility of further negotiation or attempted settlement * * *." (R. 29) That letter commenced the running of the time limitations prescribed in both Articles VII and VIII of the Contract and therefore Petitioner indisputably failed to perform the contractual conditions precedent to compulsory arbitration.

For that reason this case is not similar to the cases now pending before this Court in which certiorari has been granted, to-wit, *United Steelworkers of America v. American Mfg. Co.*, Case No. 360, 264 F. 2d 624 and *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, Case No. 443, 269 F. 2d 633. In those cases the questions involved the width or extent of the subject matter covered by arbitration clauses. Here no such issue is presented. The simple truth is that in order to grant the relief requested, the District Court would have had to rewrite the contract. It did not possess that power.

CONCLUSION

On the undisputed facts Respondent was entitled to dismissal of the Petitioner's action as a matter of law.

There is no unique or cogent reason for review of this case by this Court. There is no conflict among the Courts of Appeal on the question involved. The lower court's decision is also in accord with the substantive law of Wisconsin and it is clearly in accord with the policy announced by this Court in *Textile Workers Union v. Lincoln Mills* (1957) 353 U.S. 448. Labor agreements

should be enforced as written; not revised to suit the desire of either party.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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